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In The

Supreme Court of the United States

October Term, 1993

CHRISTINE McKENNON,

*Petitioner,*

v.

NASHVILLE BANNER PUBLISHING CO.,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the Sixth Circuit*

**RESPONDENT'S BRIEF IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the courts properly denied Petitioner any remedy based on her admittedly serious misconduct, her concession that the doctrine of after-acquired evidence of wrongdoing applies to the facts of her case, and her inability to show any pretext.

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No. 93-1543

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In The

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**RESPONDENT'S BRIEF IN OPPOSITION**

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**STATEMENT OF THE CASE**

**A. The Proceedings Below**

On May 6, 1991, Petitioner filed this lawsuit in the United States District Court for the Middle District of Tennessee alleging that her discharge from employment with Respondent the

Nashville Banner Publishing Co. ("the Banner")<sup>1</sup> violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101.<sup>2</sup> (R. 1). After Petitioner's responses to the Banner's requests for documents and Petitioner's deposition revealed that she had stolen proprietary and confidential documents from the Banner during her employment as a confidential secretary for the Banner's Comptroller, the Banner moved for summary judgment. (R. 7-9). The grounds for the motion for summary judgment ("Motion") were that Petitioner's admission of theft left no genuine disputes of material fact. Specifically, the Motion posited that Petitioner's admission that had the Banner known of the theft she could and would have been discharged and the undisputed testimony of four of the Banner's principals precluded Petitioner from any relief under the doctrine of after-acquired evidence of wrongdoing ("the doctrine"). (R. 21-24).

Petitioner sought and was granted an extension of time to respond to the Banner's Motion. (R. 10 & 12). Both before and during that time, Petitioner conducted discovery, taking the depositions of four of the Banner's principals.<sup>3</sup>

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1. The Banner is a closely held private corporation, with no parent or subsidiary company, in the business of publishing a daily newspaper known as the *Nashville Banner*.

2. Analysis of Plaintiff's age discrimination claim under Tenn. Code Ann. § 4-21-101 is the same as under the ADEA. *Trentham v. K-Mart Corp.*, 806 F. Supp. 692 (E.D. Tenn. 1991).

3. Specifically, Petitioner deposed Irby C. Simpkins, Jr., President of the Banner and Publisher of the *Nashville Banner*; Edward F. Jones, Editor of the *Nashville Banner*; Imogene Stoneking, Comptroller of the Banner and Petitioner's supervisor; and Elise D. McMillan, General Counsel and Executive Vice President of the Banner.

After these depositions, Petitioner opposed the Banner's Motion by arguing that summary judgment should be denied because her wrongdoing was not serious enough to warrant termination. (R. 25). The district court granted the Banner's Motion, finding that the undisputed facts revealed that the nature and materiality of Petitioner's misconduct provided "adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge." App. 17a.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that, based on the facts of this case, the district court properly granted summary judgment. App. 2a. Specifically, the Sixth Circuit relied on *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), and two prior Sixth Circuit cases<sup>4</sup> to hold that the doctrine applied to Petitioner's misconduct during her employment. App. 4-8a. In addition, the Sixth Circuit rejected Petitioner's argument that she was justified in having a "lever with which to resist" a possible discharge, App. 8a, noting that adoption of this theory would justify an employee's taking money from her employer to support herself in anticipation of unlawful discharge. App. 9a.

In her Petition for a Writ of Certiorari, Petitioner concedes the applicability of the doctrine but asks this Court to select the Eleventh Circuit's approach to the remedies available under the doctrine rather than that taken by the Sixth Circuit. Petition at 11.

## B. Counter Statement of the Facts

In reviewing the Motion, the district court viewed the facts in the light most favorable to Petitioner. However, the statement of

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4. *Johnson v. Honeywell Info. Sys. Inc.*, 955 F.2d 409 (6th Cir. 1992); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993).

the facts in the Petition is so misleading that Petitioner has in effect attempted to recast the facts as developed by the record. Petitioner has omitted many material facts developed in the proceedings below and misstated other facts that are relevant to the disposition of the Petition. Accordingly, the Banner presents the facts as they appear in the record.<sup>5</sup>

Petitioner was an at-will employee who was one of nine employees laid off October 31, 1990, as part of a reduction in force the Banner instituted to address financial concerns.<sup>6</sup> (R. 2). From March, 1989, through October 31, 1990, Petitioner held the position of secretary to Imogene Stoneking, the Banner's Comptroller.<sup>7</sup> (R. 1). Petitioner's duties in this position included maintaining personnel files, assisting in the preparation of the Banner's annual budget, processing time sheets, and doing various other tasks assigned to her by Ms. Stoneking. (R. 1).

As secretary to the Comptroller, Petitioner had access to confidential documents and information, including payroll data, financial information, personnel files, and other confidential records. (R. 8). In her deposition, Petitioner admitted that she

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5. It should be noted that Petitioner fails to cite to any record other than the district and appellate courts' decisions.

6. In her statement of the facts, Petitioner concedes that she was aware of the Banner's financial concerns, but she adds an incorrect gloss to her factual statement when she states that the Comptroller "began to suggest retirement," implying that the question of Petitioner's retirement came up more than once. In her deposition, Petitioner admitted that the Comptroller asked Petitioner about her retirement plans once, and only once. (R. 39).

7. Contrary to her statement in her Petition, Petitioner was not employed by the Nashville Banner Publishing Co. since May, 1951. Petitioner was employed by the corporate defendant in this case only since 1971. (See generally, R. 39).

understood that all of this information was confidential and proprietary business information. (R. 39). Petitioner also admitted that she understood that the Banner was relying upon her to safeguard the confidentiality of the business and proprietary information to which she had access as the Comptroller's secretary. (R. 39). She further admitted knowing that she was to keep this information strictly confidential and that the failure to do so could and would result in termination. (R. 39).

Thus, despite holding a position of trust with the Banner and despite being fully aware of her obligation to maintain the confidentiality of the information to which she was privy, Petitioner admitted during her deposition that she surreptitiously photocopied and removed from the Banner's premises several sensitive financial documents and personnel records.

Contrary to Petitioner's implication in her Petition that the documents she copied and took home were nothing more than published "newspaper financial information," Petition at 5 n. 2, the stolen documents contained financial data of the Banner, its officers, and others. Specifically, the Banner discovered during Petitioner's deposition that, before she was terminated, Petitioner had copied the Nashville Banner Fiscal Period Payroll Ledger that set forth salaries and related information pertaining to the Banner's owners, several management personnel, and certain administrative staff. (R. 39). She also copied the Nashville Banner Publishing Co.'s 1989 Profit and Loss Statement. (R. 39).

Petitioner admitted that in copying these documents she intentionally disobeyed the Comptroller's specific instructions to shred them. (R. 39). Instead, she photocopied the documents and used them for her own purposes. (R. 39). Knowing full well the highly confidential nature of these documents and her duty to maintain their confidentiality, Petitioner removed them from the

Banner's premises and shared the information with her husband.<sup>8</sup> (R. 39). Because Petitioner knew that she was not authorized to take and use these documents for her own purposes, she copied and removed them secretly, not telling the Comptroller or anyone else at the Banner that she had copied these documents or that she was removing them from the premises. (R. 39).

In addition to the documents she had been instructed to shred, Petitioner secretly copied and removed from the Banner's premises several documents contained in the personnel file of a Banner manager. (R. 39). Among these documents was a confidential agreement entered into between the Banner and the manager and a series of documents relating to that agreement. (R. 39). Petitioner admitted that she understood she was not authorized to copy any of these documents, much less remove them from the Banner's premises and share the contents with anyone. (R. 39).

The first time the Banner became aware that Petitioner had secretly copied and removed confidential financial and personnel documents was during her deposition on December 18, 1991.<sup>9</sup> (R.

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8. Petitioner divulged to her husband confidential and proprietary salary information concerning the following individuals: Irby Simpkins, President of the Banner and Publisher of the *Nashville Banner*; Brownlee Currey, Chairman of the Board of the Banner; Elise McMillan, the Banner's General Counsel and Executive Vice-President for Administration; Imogene Stoneking, Comptroller; Edward F. Jones, Editor of the *Nashville Banner*; Jack Gunter, Director of Special Projects; and various secretaries. (R. 39).

Although Petitioner tries to understate the severity of her misconduct, the Banner was forced to obtain a protective order in the district court in order to protect the proprietary and confidential information that Petitioner had put at the unfettered disposal of herself and her husband. (R. 6).

9. During discovery, Petitioner produced confidential and proprietary documents belonging to the Banner. However, the Banner did not know when or how Petitioner obtained these documents until her deposition.

8). Petitioner testified that she took these documents without authorization from and without asking anyone at the Banner, that she had been instructed to shred two of the documents she copied, and that she understood that these actions could and would subject her to termination. (R. 39). In her deposition, she testified that the reason she copied and removed the documents was for her "insurance" and "protection." App. 12a.<sup>10</sup>

As a result of the discovery of Petitioner's misconduct, the Banner informed her by letter that her actions constituted deliberate misconduct involving breach of trust and confidentiality obligations essential to her position as a confidential secretary. (R. 8). In this letter, in his Affidavit, and in his deposition, the Banner's President stated that had the Banner been aware of Petitioner's breach of trust and misconduct at the time that it occurred or at any time thereafter the Banner would have terminated her immediately. (R. 8; R. 29). Similarly, in affidavits and again in deposition testimony, every other member of the Banner's management involved in Petitioner's employment stated unequivocally under oath that they would have terminated or recommended termination of Petitioner. (R. 8). Even though Petitioner's counsel deposed each of these managers, she is able to offer nothing to rebut their testimony. App. 17a.

## SUMMARY OF ARGUMENT

This Court should not grant *certiorari* because the facts of this case would entitle Petitioner to no relief in any of the circuits that have applied the doctrine. Therefore, summary judgment was properly granted against Petitioner.

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10. It was only in an affidavit filed three months after her deposition to resist the Banner's Motion that Petitioner decided that her intent in taking the documents was to learn information about her job security concerns. (R. 28). The Banner's objection to Petitioner's effort to recast the facts by way of a sham affidavit was mooted by the district court's grant of the Motion.

All of the circuits that have considered the doctrine have applied it, and Petitioner concedes the applicability of the doctrine. Further, all of the circuits have recognized that the doctrine is to be applied on a case-by-case basis and that there is no absolute rule regarding the doctrine. Based on the facts of each case and on the employer's proof, the circuits have applied the doctrine either to preclude all relief or to allow only limited relief. Therefore, contrary to Petitioner's contention, the circuits are not "irreconcilably in conflict." Close inspection of the cases reveals that the differences between the circuits result not in the application of the doctrine but from each set of facts presented.

In the present case, Petitioner disputes only the denial of back pay by the Sixth Circuit. However, based on a case-by-case review, the unique facts of this case would bar Petitioner from any relief, including back pay, because the undisputed facts established that she engaged in serious on-the-job misconduct and that this misconduct would have led to her termination if her employer had known about it while she was employed. Thus, based on the undisputed material facts of this case, Petitioner would have been denied relief under the approaches taken by all of the circuits that have addressed the doctrine.

Therefore, this case is not a proper vehicle for the Court to review the availability of back pay under the doctrine.

## REASONS FOR DENYING THE WRIT

### I.

#### RELIEF WAS PROPERLY DENIED TO PETITIONER BECAUSE PETITIONER ADMITS BOTH SERIOUS WRONGDOING AND THE APPLICABILITY OF THE DOCTRINE.

Petitioner misleads the Court when she inaccurately states

that this case presents the same issue as *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), and that the circuits are in irreconcilable conflict over the issue. All that Petitioner has done is to restate the question presented from *Milligan-Jensen*, ignoring the obvious differences that the two cases present. Based on the unique facts of the present case, any conflicts between the circuits dissolve, making Petitioner's statement misleading and inaccurate.

#### A. All Circuits That Have Considered The Doctrine Have Adopted It.

Specific articulation of the doctrine arose in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988). The Tenth Circuit in *Summers* reasoned that, even though the employee's on-the-job misconduct was not the actual cause for the discharge, summary judgment for the employer was proper because the employee's misconduct precluded any relief. *Id.* at 708. Since the *Summers* decision<sup>11</sup>, the Sixth<sup>12</sup>, Seventh<sup>13</sup>, and Eleventh Circuits<sup>14</sup>

11. In addition to the *Summers* case, the Tenth Circuit has applied the doctrine in two other cases: *O'Driscoll v. Hercules, Inc.*, 12 F.3d 176 (10th Cir. 1994) and *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993).

12. *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993); *Paglio v. Chagrin Valley Hunt Club Corp.*, 1992 U.S. App. Lexis 15,399 (6th Cir. June 25, 1992); *Dotson v. United States Postal Service*, 977 F.2d 976 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 263 (1992); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992).

13. *Kristufek v. Hussmann Food Service Co.*, 985 F.2d 364 (7th Cir. 1993); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992); *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992); *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989).

14. *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992).

have recognized the applicability of the doctrine under certain circumstances. In addition, district courts in many circuits<sup>15</sup> have applied the doctrine. Therefore, the circuits are not in irreconcilable conflict over the doctrine.

Further, all of the circuits have applied the doctrine with care to avoid having employers rummage through a discharged employee's file and ferret out minor infractions to justify after-the-fact an otherwise discriminatory discharge. *See, e.g., Johnson v. Honeywell Info. Sys. Inc.*, 955 F.2d 409, 414 (6th Cir. 1992); *Washington v. Lake County, Ill.*, 969 F.2d 250, 255-56 (7th Cir. 1992). The standard for the doctrine is high to avoid just such abuse. Thus, where — and only where — the employee's wrongdoing is of the magnitude that there would be just and proper cause for termination and the evidence is undisputed that the employer would in fact have discharged the employee does the doctrine come into play.

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15. The following is a representative, not exhaustive, list: *Moodie v. Federal Reserve Bank*, 831 F. Supp. 333 (S.D. N.Y. 1993); *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314 (D.N.J. 1993); *Rich v. Westland Printers*, 62 Fair Empl. Prac. Cases (BNA) 379 (D.Md. 1993); *Russell v. Microdyne Corp.*, 830 F. Supp. 305 (E.D. Va. 1993); *Agbor v. Mountain Fuel Supply Co.*, 810 F. Supp. 1247 (D. Utah 1993); *Malone v. Signalj Processing Technologies, Inc.*, 826 F. Supp. 370 (D. Colo. 1993); *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992), appeal docketed, No. 92-15625 (9th Cir. 1992); *Benson v. Quanex Corp.*, 58 Fair Empl. Prac. Cases (BNA) 743 (E.D. Mich. 1992); *Redd v. Fisher Controls*, 814 F. Supp. 547 (W.D. Tex. 1992); *Bonger v. American Water Works*, 789 F. Supp. 1102 (D. Colo. 1992); *DeVoe v. Medi-dyn, Inc.*, 782 F. Supp. 546 (D. Kan. 1992); *George v. Meyers*, No. 91-2308-0, 1992 U.S. Dist. LEXIS 6419 (D. Kan. April 24, 1992); *Sweeney v. U-Haul Co. of Chicago*, 55 Fair Empl. Prac. Cases (BNA) 1257 (N.D. Ill. 1991); *Churchman v. Pinkerton's, Inc.*, 756 F.Supp. 515 (D. Kan. 1991); *Punahale v. United Air Lines, Inc.*, 756 F. Supp. 487 (D. Colo. 1991); *Mathis v. Boeing Military Airplane Co.*, 719 F. Supp. 991 (D. Kan. 1989).

Those circuits that have adopted the doctrine have taken slightly different approaches to how an employee's serious and material misconduct should affect his or her remedy. The Tenth and Sixth Circuits and the Seventh Circuit in *Washington* have agreed that serious misconduct should bar any remedy. The Eleventh Circuit and the Seventh Circuit in *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364 (7th Cir. 1993), have declined to cut off all prospect of back pay under the specific facts that those cases presented. Indeed, the Eleventh Circuit has stated unequivocally that the scope of the remedy is best determined on a case-by-case basis. *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174, 1181 (11th Cir. 1992).

#### **B. The Doctrine Fully Applies To The Undisputed Facts Of This Case.**

All of the facts necessary to apply the doctrine are undisputed in the present case. Petitioner admitted that she secretly copied confidential and proprietary business information from the Banner while she was employed there. Petitioner then removed the documents from the Banner's premises and shared the contents with her husband and attorney.

Petitioner admitted knowing that this information was to be kept strictly confidential and that the failure to do so could and would result in termination. She also admitted that she intentionally disobeyed specific instructions by her superior to shred some of the documents. Petitioner also testified under oath that she took confidential documents from a manager's personnel files, including information about the manager's salary and related matters, to use for her own benefit. Petitioner did not have permission to take any of these documents.

The district court found Petitioner's actions to be both undisputed and the type of misconduct contemplated by the doctrine.

The Court does not hold that any or all misconduct during employment constitutes just cause for dismissal or serves as a complete defense to a wrongful discharge action. The Court concludes, however, that Mrs. McKennon's misconduct, by virtue of its nature and materiality and when viewed in the context of her status as a confidential secretary, provides adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge.

App. 16a-17a.

In addition, the district court found that the undisputed evidence showed that the Banner fully met its burden of proving that Petitioner would have been terminated for her misconduct had the Banner known about it while she was still employed there. Under oath, the President and three top-level Banner managers all testified unequivocally that had the Banner been aware of Petitioner's breach of confidentiality and misconduct at the time that it occurred, or at any time thereafter, the Banner would have terminated her immediately.<sup>16</sup> The district court also found that Petitioner was unable to offer any evidence even tending to show that the Banner would have continued her employment had the Banner known of her misconduct before her termination. App. 17a. Indeed, Petitioner admitted that she knew she could and would have been discharged had she breached her duty of confidentiality. (R. 39).

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16. Contrary to the misleading impression in the Petition, the Banner's proof that it would have fired Petitioner was not based "solely" on affidavits from the Banner's principals. Petitioner's counsel also took depositions of these principals.

The district court properly applied the summary judgment standard to the facts of this case and found that because there were no genuine issues of material fact the Banner was entitled to summary judgment as a matter of law.

### **C. The Facts Of This Case Would Entitle Petitioner To No Relief.**

The facts of this case differ from those in the cases Petitioner cites.

Applying the facts of the instant case to the position taken by the Seventh Circuit in *Kristufek* would not change the result reached by the Sixth Circuit. The Seventh Circuit in *Kristufek* stated that an employee can recover back pay only where the after-acquired evidence involved a non-critical, non-fundamental job requirement and the employer did not adequately show that the employee *would* have been fired, not just that the employee *might* have been fired, for the misconduct in question.<sup>17</sup> *Kristufek*, 985 F.2d at 369.

In the present case, Petitioner admitted stealing confidential and proprietary documents from the Banner. The after-acquired evidence of theft clearly involved a critical and fundamental job requirement. In keeping with the standards of the doctrine, the district court found that Petitioner's misconduct rose to the level of being serious and material. Also, the district court found that the Banner *would* have fired Petitioner for theft of the confidential and proprietary documents. Therefore, even under the Seventh

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17. The court in *Kristufek* distinguished *Summers* based on significant factual and proof differences between the cases. In *Kristufek*, the employer did not prove that it *would have fired* the employee for his misconduct, whereas in *Summers* the employer met this burden. As in *Summers*, the Banner proved unequivocally that it *would have fired* Petitioner.

the Seventh Circuit's approach in *Kristufek*, Petitioner would not be entitled to any relief.<sup>18</sup>

Only seven months before the *Kristufek* decision, the Seventh Circuit relied on *Summers* in deciding *Washington*. Applying the *Summers* rule, the Seventh Circuit panel affirmed summary judgment in favor of the employer and concluded that the employee was not entitled to relief because he would have been fired for the later-discovered serious misconduct.<sup>19</sup> *Washington*, 969 F.2d at 256-57. Curiously, the Seventh Circuit in *Kristufek* did not mention its prior decisions in *Washington* or *Reed*. However, from the different outcomes in *Kristufek* and *Washington*, it is clear that the Seventh Circuit, like the Eleventh Circuit, has not adopted a stringent rule regarding the doctrine but will decide each case on its facts. This is contrary to Petitioner's assertion that the Seventh Circuit has taken an "intermediate position on this issue." Petition at 9.

Like the other circuits that have addressed this issue, the Eleventh Circuit in *Wallace*, declined to adopt a rigid rule and specifically stated that it will review the issue of after-acquired

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18. Significantly, the court in *Kristufek* addressed the issue of damages only after upholding the jury's finding of discrimination. The court in *Kristufek* held that sufficient evidence of discrimination was presented for the jury to find pretext. Petitioner has presented no evidence of discriminatory pretext in this case. See Section II, *infra*. Most of the cases allowing limited relief under the doctrine have involved evidence of discrimination.

19. Between the time of the decisions of *Washington* and *Kristufek*, the Seventh Circuit decided *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992). In *Reed*, the court, upholding summary judgment for the employer on other grounds, stated that under *Summers* the employer would have been entitled to summary judgment had it proved that it would have fired the employee for the misconduct at issue. *Id.* at 1298. If the employer had met its burden of proof, then the employee would have been denied any relief. *Id.*

evidence on a case-by-case basis. 968 F.2d at 1178. Thus, in the absence of a hard and fast rule, the Eleventh Circuit has implicitly condoned denial of back pay in an appropriate situation, which the present case presents. Therefore, the Eleventh Circuit's decision in *Wallace* is not "irreconcilably in conflict" with other circuits as Petitioner asserts.

Petitioner concedes that the Eleventh Circuit in *Wallace* recognized that wrongdoing can limit the relief available. Notwithstanding its acceptance of the doctrine, the Eleventh Circuit in *Wallace* hypothesized some extreme possibilities of employer abuse. See 968 F.2d at 1180-81. The present case defies the "parade of horrors" listed in *Wallace*, which do not occur in the after-acquired evidence situation if the standards of the doctrine are properly applied. The requirements that misconduct be material and job related and that the employer carry its burden of proving that it would have fired the employee had it known the truth fully protect against any employer abuse. Actually, this case presents the perfect scenario for the application of the doctrine: Petitioner voluntarily divulged to the Banner and later admitted to her serious misconduct. There is no evidence of employer abuse in the present case.

Petitioner cites to this Court's recent decision in *ABF Freight System, Inc. v. NLRB*, 114 S. Ct. 835 (1994), stating that it deals with a related issue. However, *ABF* is significantly distinguishable from the present case and, therefore, is not applicable here.

First, *ABF* is not an after-acquired evidence case.<sup>20</sup> The employer in *ABF* knew prior to making the termination decision that the employee had lied about why he was late to work. After the employee was terminated, he again lied, this time under oath to an

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20. The *ABF* decision does not mention or refer to the after-acquired evidence doctrine and does not cite any after-acquired evidence cases.

NLRB Administrative Law Judge. Second, this Court in *ABF* did not judge the merits of whether the employee should have been reinstated with back pay, even though he committed perjury. Rather, the only question was whether the agency had the discretion to fashion the remedy it did in the case.<sup>21</sup>

However, this Court did not completely ignore the merits of the agency's decision. This Court agreed with the employer that, consistent with its appraisal of the employee's false testimony, reinstatement and back pay should have been precluded. *Id.* at 839. Justices Scalia and O'Connor in their concurring opinion invoked the "unclean hands" doctrine and stated, "[t]he principle that a perjurer should not be rewarded with a judgment — even a judgment otherwise deserved — where there is discretion to deny it, has a long and sensible tradition in the common law." *Id.* at 842. This statement applies with equal merit to the misconduct of theft and deceit in the present case.

Third, because of the facts presented by *ABF* and the narrow issue before it, this Court did not have to determine whether the employer could prove that it would have fired the employee for the misconduct as is required in after-acquired evidence cases. Again, however, this Court did not completely ignore this issue. This Court noted that "[t]he Board found that the record in this case unequivocally established that *ABF* did not treat Manso's dishonesty 'in and of itself as an independent basis for discharge or any other disciplinary action.'" *Id.* at 838 n. 5 (citing 304 N.L.R.B. 585, 590 (1991)).

Fourth, as in after-acquired evidence cases that have allowed a plaintiff limited relief in the form of back pay, there was direct

21. This Court's decision to uphold the NLRB's ruling was based on mandatory deference to the agency in the absence of evidence that the agency's decision was arbitrary, capricious, or manifestly contrary to law. *AFB*, 114 S. Ct. at 839.

evidence of unlawful conduct by the employer in support of the employee's contention that the termination decision was pretextual. There is no evidence of pretext in the present case. See Section II, *infra*. Therefore, this Court's decision in *ABF* does not restrict the application of the after-acquired evidence doctrine to preclude relief in cases where the employer can prove that it would have terminated an employee for serious on-the-job misconduct discovered after the employee's termination.

Contrary to Petitioner's unfounded assertion, the facts presented in the present case are more obviously compelling than those in *Milligan-Jensen*, providing even stronger support to apply the doctrine to preclude relief to Petitioner. Unlike the present case, in *Milligan-Jensen* there was direct evidence of sex discrimination by the employer.<sup>22</sup> Petitioner's attempt to argue that *Milligan-Jensen* is somehow materially different from the present case because it involved application fraud is also misguided. The Sixth Circuit in both *Milligan-Jensen* and this case applied the same standard: whether the employee *would have been fired* if the employer had known of the serious misconduct. Once there is a finding of "would have been fired," whether the misconduct occurred prior to or during employment is irrelevant. *Milligan-Jensen*, 975 F.2d at 304-05 & n. 3.

Further, there is no proof that the Banner's actions in any way caused Petitioner to steal confidential and proprietary documents, as Petitioner asserts.<sup>23</sup> The district court found as a matter of law

22. Petitioner's statement that this case presents facts that are arguably more compelling than those in *Milligan-Jensen* has a paradoxically boomerang effect because in that case there was direct evidence of discrimination, whereas there is none in this case. See 975 F.2d at 303 ("You're the woman, aren't you? ... You've got the lady's job."). In this case, there is neither direct nor circumstantial evidence of discrimination.

23. It goes without saying that stealing personal and proprietary information has no connection to protection from any future alleged discrimination.

that Petitioner's motivation in stealing the documents was irrelevant to the application of the doctrine. Therefore, when compared to *Milligan-Jensen*,<sup>24</sup> the facts of the present case should compel this Court to deny certiorari because the Sixth Circuit clearly reached the proper result even in light of decisions from other circuits.

## II.

### SUMMARY JUDGMENT WAS PROPER BECAUSE PETITIONER SHOWED NO PRETEXT.

Petitioner offered no evidence to rebut the Banner's proof that she would have been terminated had it discovered her misconduct while she was employed. App. 17a. In the absence of any showing that the Banner's explanations were pretextual, summary judgment for the Banner was proper.

Just recently, this Court clarified the evidentiary formula for proving pretext: "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2752 (1993) (emphasis in original). There are no facts in this case to support even an inference, much less proof, either that the Banner's evidence that Petitioner would have been discharged was false or that the Banner fabricated this reason to discriminate against Petitioner.

Even if Petitioner had not admitted the applicability of the doctrine to her case, summary judgment against Petitioner would have been properly granted because she is unable to meet this Court's standard to survive summary judgment under *Matsushita*

24. Significantly, the Sixth Circuit in *Milligan-Jensen* reversed the district court's denial of summary judgment and directed that judgment be entered in favor of the employer.

*Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317, (1986). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time to conduct full discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.<sup>25</sup>

As the facts show, Petitioner had adequate time to conduct full discovery. After Petitioner served interrogatories and document requests and received timely responses, Petitioner sought and was granted leave to complete additional depositions to rebut the Banner's Motion. Both before and after the extension of time, Petitioner deposed four of the Banner's principals.

Notwithstanding ample time to discover any pretext on the part of the Banner, Petitioner found none. Petitioner made no showing that the Banner fabricated evidence against her or treated her differently from other employees. The record is clear that the Banner fully carried its burden of proof and that Petitioner made no showing that this proof was pretextual. See *St. Mary's Honor Ctr.*, 113 S. Ct. at 2748. Accordingly, under this Court's 1986 trilogy of cases, summary judgment was proper.

25. The ultimate burden is on the non-moving party to show the existence of a genuine issue of material fact: "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.' Fed. Rule Civ. Proc. 56(e)." *Matsushita*, 475 U.S. at 586-87. (emphasis supplied). Finally, "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment, . . . even where the evidence is likely to be within possession of the defendant, as long as the plaintiff had had a full opportunity to conduct discovery." *Anderson*, 477 U.S. at 257.

Petitioner's hypothetical argument betrays a misunderstanding of this trilogy of cases and of her ultimate burden. Petitioner argues that if the Banner had known about and terminated her for stealing the documents she could simply have claimed that the reason for discharging her was pretextual and had a jury trial on the issue. Petition at 10. This argument is without merit.

Petitioner has the ultimate burden to come forward with more than "some metaphysical doubt as to the material facts" in order to present a jury question. *Matsushita*, 475 U.S. at 586-87. Petitioner could not merely have "alleged that the Banner's reason was a pretext for age discrimination, and had a jury trial on the issue." Petition at 10. Rather, in the face of a properly supported motion for summary judgment, Petitioner would be required to present affirmative evidence of pretext, *Anderson*, 477 U.S. at 257, tending to show that the Banner's reason for termination was false or that it would have continued her employment. *St. Mary's Honor Ctr.*, 113 S. Ct. at 2751-54.

In the present case, Petitioner has come forward with not even a scintilla of either pretext or discrimination. If Petitioner had been able to show pretext, her hypothetical might have some credibility, but the undisputed facts of the present case would not entitle Petitioner to a jury trial on the issue of pretext. Thus, even if Petitioner had not conceded that her misconduct warranted application of the doctrine to her claim of discrimination, her case would remain subject to summary judgment, contrary to Petitioner's hypothetical.

### III.

#### PETITIONER RELIES ON INAPPLICABLE LAW AND POLICY.

Petitioner's reliance on Section 107 of the Civil Rights Act of 1991 ("CRA 1991") both is misplaced and undermines her plea that what she characterizes as the remedy "rule"<sup>26</sup> by the Eleventh Circuit be adopted. First, CRA 1991 is inapplicable to the ADEA in regard to proof or remedy. Second, CRA 1991 does not apply to conduct that occurred before the effective date of this Act, November 21, 1991, and to a lawsuit filed before that date. *Landgraf v. USI Film Prods.*, 1994 U.S. LEXIS 3292 (April 26, 1994). Here, both the Banner's reduction in force and the lawsuit occurred well before November 21, 1991.<sup>27</sup>

Petitioner points to the EEOC's position taken in its *amici curiae* brief in support of the grant of certiorari in *Milligan-Jensen*. Whatever position that the EEOC takes when it is litigating in its advocacy role is irrelevant here, but its policy guidance statements are relevant. Before CRA 1991, which is the applicable time for this case, the EEOC issued guidance directing its own staff to follow *Summers*:

*[I]n these circumstances, as in cases where discrimination is proved through circumstantial evidence, the employer may be able to limit other relief available to the plaintiff by showing that after-the-fact lawful reasons would have justified the same action.*

26. The Eleventh Circuit has not adopted an inflexible "rule." Rather, the *Wallace* decision adopted a case-by-case analysis.

27. Even if CRA 1991 were applicable, § 107(b) specifically disallows any back pay, which is what Petitioner seeks.

For example, if a charging party is terminated for discriminatory reasons, but the employer discovers afterwards that she stole from the company, and it has an absolute policy of firing anyone who commits theft, *then the employer would not be required to reinstate the charging party or to provide back pay. . . . See, e.g. Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F.2d 700, 48 EPD ¶ 38,543 (10th Cir. 1988) (plaintiff entitled to no relief where evidence that he falsified numerous company records was discovered after termination). . . .

*Policy Guidance on Recent Developments in Disparate Treatment Theory*, N-915.063, EEOC Compl. Man. (BNA) N:2119 at 2132-33 and n.17 (emphasis added).<sup>28</sup> Under this guidance, then, the Commission would not have sought any individual relief on behalf of Petitioner where after-acquired evidence of misconduct showed that termination was inevitable.

### CONCLUSION

The Petition before the Court should be denied because the Sixth Circuit's judgment was proper in this case. Even under other circuits' approaches to the application of the doctrine, the result in the present case would not be different. Petitioner concedes the applicability of the doctrine to her admitted theft of her employer's confidential and proprietary documents. Petitioner admits that had her employer known about the theft she could and would have been discharged. At the same time that she concedes the applicability of the doctrine to her admittedly serious wrongdoing, Petitioner is

28. After CRA 1991, the EEOC changed its view of *Summers*. However, it is the EEOC's view of *Summers* before CRA 1991 that is instructive here because, as previously stated, CRA 1991 does not apply to the present case.

asking this Court to reward her with money damages. This position is untenable, especially in view of Petitioner's failure to make any showing of pretext. Therefore, it would not be a judicious expenditure of the Court's resources to review the present case.

Accordingly, the Banner respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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